

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

ENERPOL, LLC

Plaintiff,

v.

SCHLUMBERGER TECHNOLOGY
CORPORATION,

Defendant.

Civil Action No. 2:17-cv-394-JRG

JURY TRIAL DEMANDED

SCHLUMBERGER TECHNOLOGY
CORPORATION.

Counterclaim Plaintiff,

v.

ENERPOL, LLC

Counterclaim Defendant.

**SCHLUMBERGER TECHNOLOGY CORPORATION'S
RESPONSE TO ENERPOL, LLC'S NOTICE OF LAW**

Schlumberger Technology Corporation ("Schlumberger") respectfully responds to EnerPol, LLC's Notice purporting to provide "appellate authority confirming district courts' discretion to find waiver against claim construction positions not timely advanced." (D.I. 95-1.) EnerPol's authority confirms that Schlumberger has not "waived" any claim construction arguments and confirms the Court's suspicion that no such Federal Circuit authority exists.¹

¹ Consistent with the Court's directive, Schlumberger's lead Texas counsel conducted the meet and confer prior to EnerPol's submission of its Emergency Motion, and Schlumberger documented that in its Response. (See D.I. 91-1, ¶¶ 4-8.)

In *Wi-Lan USA, Inc. v. Apple, Inc.*, after issuance of the *Markman* order and entry of summary judgment of non-infringement, the patentee sought a new construction that contradicted its original proposal. 830 F.3d 1374, 1384 (Fed. Cir. 2016). Still the district court found no waiver and the Federal Circuit affirmed. *Id.* at 1385. By contrast, Schlumberger seeks the same construction it proposed in its P.R. 4-2 and 4-3 submissions, relying in part on technical dictionaries that it timely disclosed.

In *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, the accused infringer stipulated to a construction, and subsequently requested a narrower jury instruction. 805 F.3d 1368, 1376 (Fed. Cir. 2015). The Federal Circuit affirmed the district court's finding that the stipulation was binding. *Id.* The Federal Circuit expressly distinguished the facts before it from *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1361 (Fed. Cir. 2008), in which the district court was "clearly aware of the parties' disagreement about the claim term." *Id.* *Akamai* confirms the Court's concern at the January 26, 2018 Hearing, that EnerPol's Emergency Motion confirms there is a dispute between the parties that must be resolved.

Dated: January 29, 2018

By: /s/ Claire A. Henry

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**ATTORNEYS FOR SCHLUMBERGER
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CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via CM/ECF on January 29, 2018.

/s/ Claire A. Henry
Claire A. Henry